Supreme Court, U.S.
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No. 09-930

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK,

Petitioners,

—against—

WADE F.B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do Veterans of the Armed Forces have Article III standing to challenge the unconstitutional taking and transfer of historic military sites?

2. Do the Petitioning individual military Veterans have a continuing right of access to the Seventh Regiment Armory in New York City for military, educational and recreational purposes, unconstitutionally deprived by state action? (Fifth and Fourteenth Amendments)

3. Do these military Veterans have a right to offer museum programs and exhibits in the National Historic Landmark armory's public spaces to educate visitors about the role of citizen-soldiers in America's wars, and has that right been violated by the state action converting those spaces into commercial restaurants? (First, Fifth and Fourteenth Amendments)

4. Do the Disabled American Veterans and other veterans' association Petitioners have a statutory right of free access to the Armory's "Veterans Room" and other historic regimental rooms for meetings and social events which has been unconstitutionally deprived by state transfer to a favored private party for commercial use? (NYS Military Law Section 183, and First, Fifth and Fourteenth Amendments)

LIST OF PARTIES

Plaintiff KENYON B. FITZGERALD, JR., is Chair of the 107th Infantry Regiment (Seventh New York) Historical Society, chartered by the Regents of the State of New York in 1964 to operate a military history museum pertaining to the Seventh Regiment New York National Guard. He served in the armed forces of the United States from June 1960 to June, 1966. He brings this action individually and as representative of the Historical Society and also as class representative of all military personnel who served in the Seventh Regiment, the 107th Infantry Regiment, and successor organizations.

Plaintiff PETER SCOVILLE WELLS is Treasurer of the 107th Infantry Regiment (Seventh New York) Historical Society. He served in the Armed Forces of the United States from 1958 to 1964, first in the 525 M. I. Group and then in the Seventh Regiment, 107th Battle Group. Mr. Wells' father and uncle also both served in the Seventh Regiment of the New York National Guard, based at the Armory. He brings this action individually and as representative, along with Mr. Fitzgerald, of the Historical Society, and as a class representative of all military personnel who have served in the Seventh Regiment, the 107th Infantry Regiment, and successor organizations.

Plaintiff SIDNEY SILLER is Department Adjutant for the Disabled American Veterans, Department of New York, Inc.; and a disabled veteran of World War II and the U.S. military force in Korea in 1945 and 1946.

Plaintiff DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC. is one of the veterans organizations expressly granted, under Sec-

tion 183 of the Military Law of New York State, the use of armories in New York State for regular and special meetings and organization social events of a private nature without payment of any charge or expense therefor. It brings this action on its own behalf and, along with Sidney Siller, as class representative for all members statewide of all other veterans' organizations granted similar rights under such law, including posts or chapters of

The United Spanish War Veterans

The American Legion

The Veterans of Foreign Wars of the United States

The Disabled American Veterans

The AMVETS

American Veterans of World War II

The Jewish War Veterans of the United States, Inc.

The Catholic War Veterans, Inc.

The Italian American War Veterans of the United States, Incorporated

The Polish Legion of American Veterans, Inc.

The Army and Navy Union of the United States of America

Posts of the Masonic War Veterans of the state of New York, Incorporated

Groups of squadrons of New York Wing

Groups of squadrons of New York Civil Air Patrol

Groups of incorporated associations of veterans of units of the organized militia

Organizations of sons of veterans of any war of the United States

Organizations of the Reserve Officers Association of the United States

Organizations of historic military commands set forth in section two hundred forty-a of the NYS Military Law

Defendants WADE F. B. THOMPSON, ELIHU ROSE, STEPHEN LASH, ARIE L. KOPELMAN, EDWARD KLEIN, REBECCA ROBERTSON, and KIRSTEN REOCH are sued herein in their individual capacities and as directors, officers and employees of defendant Seventh Regiment Armory Conservancy, Inc.

Defendant CHARLES GARGANO was Chair of the Empire State Development Corporation, and defendants WILLIAM SHERMAN and CAROL BERENS were Project Managers of ESDC at the times of the wrongful actions described below. Defendants GARGANO, SHERMAN and BERENS are sued herein in their individual and representative capacities.

Defendant SEVENTH REGIMENT ARMORY CONSERVANCY, INC. ("the Conservancy") is the purported Lessee of the Armory from the State of New York acting through the Empire State Development Corporation ("ESDC"). The Conservancy is a not-for-profit corporation organized under the laws of the State of New York (using a deceptive name that falsely suggests some official connection with the Seventh Regiment).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, counsel for Petitioners certify that Disabled American Veterans, Department of New York, Inc. is a 501(c)4 non-profit New York State membership corporation. Its corporate parent is Disabled Veterans, chartered by Congress. It is affiliated with Disabled American Veterans of New York Services, Inc., a 501(c)3 non-profit corporation.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The Decision and Judgment of the District Court dismissing Petitioner's Complaint in its entirety, filed on January 5, 2009, is reported unofficially at 2009 WL 29599 (S.D.N.Y) and is reproduced in the Appendix at page 7a.

The Order of the U.S. Court of Appeals for the Second Circuit, affirming the District Court, filed on November 16, 2009, is reported unofficially at 2009 WL 3806414(C.A.2(N.Y.)) and is reproduced in the Appendix at page 1a.

BASIS FOR JURISDICTION IN THE SUPREME COURT

The order of the Court of Appeals sought to be reviewed was entered on November 16, 2009. This Petition for Certiorari is being filed within 90 days thereof.

The statutory provisions believed to confer on this Court jurisdiction to review on a writ of certiorari the order in question are 28 U.S.C. Sections 1254(1) and 2101.

Certiorari is appropriate under Supreme Court Rule 10(c) because a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article III; Article VI; Amendment I; Amendment V; and Amendment XIV, Section 1 (All in pertinent part)

Article III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, * * * .

Article VI

* * * This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding * * *

Amendment I

Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Military Law § 183 (in pertinent part)

Paragraphs (a) and (b) of New York State Military Law § 183

§ 183. Use of armories. 1. Armories may be used as follows:

(a.) By members and units of the organized militia and cadet corps of such units.

(b.) On application of one or more posts or chapters of the United Spanish War Veterans, the American Legion, the Veterans of Foreign Wars of the United States, the Disabled American Veterans, the AMVETS, American Veterans of World War II, the Jewish War Veterans of the United States, Inc., The Catholic War Veterans,

> Inc., the Italian American War Veterans of the United States, Incorporated, the Polish Legion of American Veterans, Inc., the Army and Navy Union of the United States of America, posts of the Masonic War Veterans of the state of New York, Incorporated or groups of squadrons of New York Wing, Civil Air Patrol, or of incorporated associations of veterans of units of the organized militia, or one or more posts or chapters of organizations of sons of veterans of any war of the United States or of the Reserve Officers Association of the United States, or those historic military commands set forth in section two hundred forty-a of the [NYS Military Law] . . . . approved by the officer in charge and control of the armory, and by his military superiors as prescribed by regulations issued pursuant to this chapter and under such restrictions as may be prescribed by the adjutant general, the officer in charge and control of an armory shall provide a proper and convenient room or rooms or other appropriate space in such armory where such posts or chapters may hold regular and special meetings and organizational social events of a private nature without the payment of any charge of expense therefore, provided that such use does not interfere with the members and units of the organized militia stationed in such armory.

Chapter 482, 2004 Laws of New York State

Chapter 482, 2004 Laws of New York State is reproduced in the Appendix at pages 26a to 36a.

STATEMENT OF THE CASE

The Seventh Regiment Armory in New York City is unique. It was built in the nineteenth century with private funds raised and contributed by volunteer members of the Regiment and placed in the ownership of the Regiment's field officers (Majors and Colonels) as Trustees. It is private property for purposes of the Fifth and Fourteenth Amendments and may not be taken by the state without due process of law and just compensation.

This case challenges the action of the New York Legislature in adopting a statute drafted by a private law firm to benefit one of its clients, passed in the closing hours of the 2004 session. The statute took ownership and control of the Armory away from the Regiment's Trustees and transferred it to the Empire State Development Corporation, which in turn leased it for 99 years to the private client for whom the legislation and bidding process was expressly crafted—defendant Seventh Regiment Armory Conservancy, Inc.

The Seventh Regiment Armory is a monument to America's citizen-soldiers as state militias, National Guard, and wartime draftees. The Seventh was the first body of troops to come to the defense of Washington, D.C. (including the U.S. Supreme Court) at the start of the Civil War.

Plaintiffs Kenyon Fitzgerald and Peter Wells are representative of the citizen-soldiers who have served on active military duty in defense of their country and its interests. Mr. Wells served in the Seventh Regiment, as did his father and uncle before him.

The Disabled American Veterans is an organization of citizen-soldiers from America's recent wars who have suffered permanent disabilities while serving their country.

All of these military veterans have joined together as Plaintiffs in this action to preserve the Seventh Regiment Armory as a historic landmark honoring the military service and sacrifice of the nation's citizen-soldiers. They oppose the Conservancy's plan to convert the landmark historic Regimental and Company rooms on the first and second floors of the nineteenth century Administration Building into an elite commercial restaurant, cocktail bar, and banquet and corporate reception facility where, according to one RFP restaurateur, well-heeled patrons will be served "fabulous food." (Complaint, Ex I. Appendix page 37a)

These historic spaces are tied to the service of volunteer citizen-soldiers who have fought for the nation since its founding. Plaintiffs argue that the spaces should be used as a military history museum under the 1964 charter granted by the Regents of the State of New York, and should tell the human story of the men and women who fought—and often laid down their lives—winning this country's independence and defending it against armed invaders[1].

There is no dispute about the desirability of restoring and preserving the Seventh Regiment Armory as a National Historic Landmark. Petitioners welcome long-overdue funding to repair and restore portions of the building that have suffered from age and insufficient funding in the past.

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[1] For one suggested Armory museum design, see website for the "LafayetteFreedomCenter.org".

However, Petitioners strenuously oppose the use of the historic regimental and company rooms of the restored Armory for commercial purposes and the transfer of absolute control over such use to a private organization antagonistic to the traditional military purposes and meaningful interpretation of the U.S. military history associated with this noble and important structure.

The basic question in this case is whether the historic Seventh Regiment Armory, built and paid for by the National Guard in the 1870s, will continue to fulfill its military purposes as an armory primarily as a military history museum telling the public the story of America's citizen-soldiers and as a meeting place for military veterans, or whether it will be converted by a private group of wealthy individuals operating under the umbrella of a tax-exempt private charity into a fashionable Performing Arts Center and Four Seasons-style restaurant complex.

Proceedings Below

The Complaint was filed in the Southern District of New York on July 31, 2007. Defendants filed a motion to dismiss under FRCP 12, which the District Court granted on January 5, 2009. (Appendix, pages 7a-25a)

Plaintiffs took a timely appeal to the Court of Appeals for the Second Circuit, which affirmed the District Court's dismissal of the Complaint by Summary Order on November 16, 2009. (Appendix, pages 1a-6a)

This Petition for Certiorari followed.

STATEMENT OF FACTS

The essential facts on which this case is founded are set forth in paragraphs 12 to 69 of the Complaint. They may be briefly summarized as follows:

The Seventh Regiment Armory was built in the 1870s on land leased to the Regiment by the City of New York to be used "exclusively" for "Armory and Drill Rooms." It was paid for out of private contributions raised by members of the militia regiment.

In 2004, the New York State Legislature passed a bill written by a New York City law firm for a private client, the "Seventh Regiment Armory Conservancy, Inc." The law firm's legislation enabled the turnover of the Armory to the "Conservancy" under a 99-year lease, along with all Armory rental income.

The Development Corporation's lease requires the Conservancy to operate the historic landmark regimental and company rooms in the Administration Building (facing Park Avenue) as commercial restaurant, cocktail lounge, and corporate reception spaces instead of "Armory and Drill Rooms". (Appendix, pages 40a to 43a) The state lease limits the area set aside for "military use" to two small offices on the third floor, inaccessible to the general public and too small for meetings and events of veterans organizations like the DAV.

A detailed recital of the history of the Seventh Regiment Armory and its takeover by the private "Seventh Regiment Armory Conservancy, Inc." is set out in the complaint. The following highlights of those allegations provide the direct factual grounds for the principal issue on this petition: have the Petitioners been deprived of any legal or Constitutional rights in continued use of the property for Armory

purposes which give them standing to bring this action?

The predecessors of the Seventh Regiment were units of all-volunteer state militia, one of which was formed as early as 1806. The Regiment itself came into being as an amalgam of these militia units in 1847. As volunteers, the members of the Regiment paid for their own uniforms and equipment, and eventually for the construction of the Regiment's Armory on land leased by the City to the Regiment's field-grade officers (Major and above). The Regiment had a particularly notable record of service during the Civil War and World War I[2].

In 1992, the Armory and its principal interior spaces were designated New York City landmarks by the NYC Landmarks Preservation Commission. The designation of the interior spaces was an unusual action, based on the Commission's finding that they constituted "historically and architecturally significant spaces."

The building is listed on the New York State and National Registers of Historic Places. In 1993, the Armory was designated a National Historic Landmark.

The Armory consists of two structures: (1) a multistoried building, or administration building (the "Administration Building"), which contains administrative offices, meeting rooms and social areas, and (2) a one-story drill room (the "Drill Hall"), used for military training.

The Administration Building contains important late nineteenth-century period rooms designed and

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[2] See statue honoring the Regiment's World War I service in New York's Central Park at Fifth Avenue and 67th Street.

decorated by leading artists and craftsmen. The Drill Hall, a 200 by 300 foot structure, is said to be the oldest extant "balloon shed" (barrel-vaulted roof supported on exposed trusses or ribs) in America.

In recent times, the Armory's principal military function has been as a center and gathering point for troops and equipment for civil emergencies. It was used as such following the terrorist attacks on September 11, 2001. The Armory has also served as work and meeting space for various Seventh Regiment-related support, social and recreational organizations (including the organizations in which Petitioners Fitzgerald and Wells have had active roles).

In recent years the large Armory Drill Hall has also been a venue for a variety of income-generating public events, including antique shows, art shows, and antiquarian book fairs serving as fundraising vehicles for community charitable organizations. Until 2004, the Regiment was directed to send all rental revenues from such activities to the State's Adjutant General, making them unavailable for repair and upkeep of the building. Now those funds are turned over to the private Conservancy.

The successor units to the Seventh Regiment have unsuccessfully requested the State to provide funds to renovate and maintain the Armory as well as pay for installation of a military history museum in the Armory, chartered in 1964 by the New York State Regents. The State has repeatedly failed and refused to provide such funding. As a result, the Armory's interior and exterior have deteriorated and are in need of repair and replacement. This "blight" is the State's own doing through deliberate withholding of funds.

The Unconstitutional Transfer of Private Property

The private property at the core of this case consists of both the Regiment's leasehold to the land on which the Armory sits, and the Armory itself. Both property interests are to be privately held in trust by the Regiment's field officers as Trustees. These property rights are in perpetuity, so long as the property is used for the Regiment's lawful purposes as an Armory and drill rooms. [See Complaint pars 18, 19, 21-26, and 36-39.]

Petitioners do not dispute the continued use and rental of the Drill Hall for selected low-impact cultural activities such as the traditional art, antiques and antiquarian book shows benefiting local charities, as being lawful purposes in the public interest.

Petitioners, however, strenuously dispute the Conservancy's non-armory use of the historic military meeting spaces on the First and Second floors of the Administration Building—all paid for out of private funds raised or provided by members of the Seventh Regiment—for corporate reception rooms and commercial restaurants. This commercial use is not a proper public purpose; is not a lawful "Armory and Drill Room" use under the City Lease; and violates the legal and Constitutional rights of Armory access of Plaintiffs and all classes of veterans they represent in this proceeding.

The Petitioners' legal contentions on its appeal below were the following:

1. The 2004 State legislation transferring the Seventh Regiment Armory from a trusteeship to a preselected private non-profit organization was an unconstitutional taking under the principle of

"impermissible favoritism" enunciated in *Kelo v. New London.*

2. Limiting the Seventh Regiment to two offices on the top floor of the Armory violated the Trustees' fiduciary duty to use the Armory "exclusively for an Armory and drill rooms."

3. The Conservancy's plan to convert the Armory's landmarked interior spaces into commercial restaurant, cocktail lounge, banquet and corporate reception facilities prevents proper armory use as a military history museum and denies free space for veterans' organizations for meetings and events.

4. The named plaintiffs and class members had legal and Constitutional rights in the Armory prior to the unlawful taking in 2004, which they have vigorously pursued.

JURISDICTIONAL STATEMENT

This action arises under the Constitution and Laws of the United States, including Amendments 1, 5 and 14; and 42 U.S.C. §1983; along with the Federal Courts' equitable and pendent jurisdiction. The District Court had jurisdiction over the federal question claims under 28 U.S.C. §1331; over declaratory judgments under 28 U.S.C. §2201; and over the statutory, common law and equitable claims under the Court's supplemental jurisdiction under 28 U.S.C. §1367. On January 5, 2009, the District Court filed its Opinion and Order dismissing the Complaint in its entirety. On November 16, 2009, the Court of Appeals affirmed the District Court's dismissal in a summary opinion and order. Both opinions are set forth in the Appendix.

WHY CERTIORARI SHOULD BE GRANTED

The Second Circuit Court of Appeals has decided an important question of federal law which should be settled by this Court (Rule 10(c))—whether Veterans of the Armed Services have Article III standing to challenge the unconstitutional taking and transfer of historic military sites.

The Circuit Court's decision conflicts with (1) this Court's recognition of injury-in-fact based on illegal actions involving a specific location (*FOE v. Laidlaw*, 528 U.S. 167 (2000)); (2) this Court's recognition of associational standing to protect the interests of individual members of membership organizations (*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1997)); and (3) this Court's series of decisions upholding of First Amendment rights of assembly, association and free speech, a number of which are cited below.

These are novel Article III questions in the context of veterans' rights that vitally affect a significant group of the U.S. population who have risked their lives preserving the very liberties they seek to enforce.

The dispute here revolves around an Empire State Development Corporation 99-year lease of the Seventh Regiment Armory in Manhattan to a favored private group for use as a performing and visual arts center combined with a high-end commercial restaurant and cocktail lounge complex, under the authority of state legislation authorizing takeover of the Armory from its Seventh Regiment Trustees.

The entire takeover of the privately-owned property and transfer to a private group was engineered

through a private law firm strategy to give control of the prized property to a client of the firm.

The State Legislature's action did not merely violate property rights of trust beneficiaries, but also deprived the individual and association plaintiffs of important First Amendment rights:

(1) their rights of association and assembly, and

(2) their right of free expression in educating the public about the roles and specifics of the history of their units and of all citizen-soldiers in defending our liberties.

When a state or local government deprives citizens of First Amendment rights, the government must justify the abridgment of freedom by showing a subordinating interest that is compelling.

> [G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.
>
> *Bates v. Little Rock*, 361 U.S. 516, 525 (1960)

That is why this Court should grant certiorari in this case. The First Amendment must not be totally scrapped to satisfy non-essential economic goals. The goal of repairing the Armory building, and even expanding public use of the Drill Hall, did not present a compelling case for taking over all the his-

toric spaces in the Administration Building for use as restaurants and corporate reception rooms, blocking a chartered military history museum, and ending the veterans' meetings and events that had taken place in the Armory for many years.

In the present case, the individual plaintiffs have suffered injuries-in-fact by their eviction from the Armory where they served for many years as veteran-volunteers for Seventh Regiment programs. The association plaintiffs have suffered injury-in-fact by the closing of access to the Regimental Rooms in the Armory to everyone except private restaurant customers. Both individual and association plaintiffs have suffered First Amendment injury-in-fact in the deprivation of their association and assembly rights in these spaces, and in the blocking of historic programs and installation of museum exhibits in those same spaces. These injuries-in-fact have all come about because of the challenged state legislation, and can be remedied by the Court's declaration of the unconstitutionality of the statute and restoring the *status quo ante*. They therefore establish Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). As the Court noted in that opinion:

> The relevant showing for Article III standing is not injury to the environment, but injury to the plaintiff.

Here injury to Petitioners includes both the loss of personal access to the Armory and elimination of their fundamental First Amendment free speech and associational and assembly rights.

ARGUMENT

POINT I

PETITIONER INDIVIDUAL MILITARY VETERANS HAVE LIBERTY AND PROPERTY RIGHTS OF ACCESS TO THE ARMORY FOR MILITARY, EDUCATIONAL AND RECREATIONAL PURPOSES WHICH GIVE THEM STANDING TO CHALLENGE THE CONSTITUTIONALITY OF STATE DENIAL OF ARMORY ACCESS AS A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Prior to the disputed State takeover and transfer, individual Petitioners Fitzgerald and Wells each had regular access to the Seventh Regiment Armory. In addition to their roles as officers and directors of the Regiment's Historical Society, they performed responsibilities at the Armory as often as several times a week in various Regimental support groups.

Fitzgerald and Wells, with the full approval of the Regiment's officers, regularly used and occupied office and meeting space in the Armory to work on Regiment-related projects. They, like other veterans of the Regiment, were also members of its Veterans Organization which held regular executive committee meetings in the Armory and an annual dinner in the Veterans' Room.

The District Court never heard oral argument on the motion to dismiss, and never asked any questions about the details of plaintiffs' interest in the property, which was adequately and properly alleged in summary fashion in the Complaint. Had the Court asked for details, the District Judge would have

learned the extent of the regular occupation and use of the Armory by Plaintiffs Fitzgerald and Wells as operations officers of various Seventh Regiment functions and activities (such as the Seventh Regiment Fund and the Seventh Regiment Rifle Club).

In the proceedings in the Court of Appeals (which had *de novo* jurisdiction to consider the facts and law on the motion to dismiss) the individual Petitioners made the following offer of proof:

If called as a witness, Kenyon Fitzgerald would testify that at the time the state legislation was adopted in August, 2004, he and Peter Wells, and other members of the Veterans of the Seventh Regiment (established in 1859) had regular, and unrestricted access and use of the Administration Building and the Drill Shed. The Seventh Regiment Fund, of which Fitzgerald is president, and its employee-curators, had access to all areas of the Armory [except the Company K room on the second floor where ownership of the contents remained with the Associates of the Engineer Corps of Company K]. The Seventh Regiment Fund (est. 1909) maintained an office on the first floor, off the original Library Room (known since 1947 as the Silver Room) where Mr. Fitzgerald regularly did his work for The Fund.

The Veterans of the Seventh Regiment maintained a special room in the Administration Building from the time of the building's completion in 1881. The veterans held monthly meetings of their Board of Management from October through May, plus two general membership meetings in June and December in the Veterans Room (on the first floor of the Armory). Over the years, numerous social functions

were held by the Veterans, both for themselves, and as sponsors for Regimental socials.

If called as a witness, Plaintiff Peter Wells would testify: Wells regularly worked as a volunteer in the Armory on the affairs of the Seventh Regiment Rifle Club and the Friends of the Seventh Regiment. He performed his duties at the Armory year-round at least once a week—sometimes three nights a week. The Rifle Club had regular shooting nights once or twice a week and dinner afterward. A night would often start at 4 p.m. and end at 10 p.m. The Rifle Club was confined to veterans and at various times had as many as 100 members. The Club room was in the basement and also the firing range was there. The annual meeting of the Rifle Club was held in the Veterans Room. In addition, both Petitioners attended regular Board meetings and Executive Committee meetings.

The State Takeover and Transfer

The Defendants wrested control of the Armory under a scenario in which state legislation—adopted without debate in the Legislature's closing hours—evaded any discussion of proposed benefits. The turnover of the Armory was adopted "to benefit a particular class of identifiable individuals"—the very individuals whose lawyers wrote and engineered the statute, bestowing benefits upon them—employing a two-step scheme through (1) enactment of Chapter 482, and (2) issuance of the 99-year lease under the new law to a pre-selected party—the Conservancy. The Conservancy's claim that this was done pursuant to an open-bidding procedure is a farce. As the Complaint alleges, the process was tailor-made from the start for one bidder only—the Conservancy.

This linking scheme, transferring the property to ESDC, and then from ESDC through a long-term lease to the favored private entity selected under a rigged-bidding scheme, effected an unconstitutional taking. The Conservancy's counsel boasted about the law firm's accomplishment on the firm's website:

> 9/22/2004
>
> **Governor Pataki Signs Into Law a Bill Drafted by Paul, Weiss**
>
> Lewis R. Clayton, Meredith J. Kane
>
> On September 22, 2004, Governor Pataki signed into law a bill drafted by Paul, Weiss lawyers that facilitates the restoration and reuse by our client the Seventh Regiment Armory Conservancy, Inc. of the historic Seventh Regiment Armory building located at Park Avenue and 66th Street. The new law, which amends provisions of the New York Military Law and the New York Urban Development Corporation Law regarding the use, disposition and renovation of the armory, enables our client to enter into a long-term lease of the Armory, to restore its extraordinary 19th century architectural and decorative splendor, and to open it to the public as a performing and visual arts center. The renovation will be accomplished with a mix of public and private funds. The bill, which was passed at the very end of the New York State legislative session, just after adoption of New York State's 2005 fiscal year budget, was drafted by Meredith Kane and Elizabeth Stein, with input from Lew Clayton.
>
> (Complaint, Ex E)

Note that the description of the legislation is that it "enables our client" to enter into a long-term lease of the Armory. This in turn assured that the "client" would collect millions of dollars in exhibition rents, ticket revenues and catering income from the property. From the outset, the Legislature's action was crafted to transfer private property from "A" to "B" in direct violation of the Supreme Court majority's language in *Kelo*, "under the mere pretext of a public purpose."

It is precisely this impermissible government manipulation to benefit known private entities that is specifically prohibited by the *Kelo* interpretation of the Takings Clause.

Facts Establishing Plaintiffs' Standing

The Seventh Regiment Armory is in a class by itself. Unlike every other armory in the nation, it was built with private funds. For 130 years it was owned and managed by Seventh Regiment Trustees. (Complaint Ex C) Those Trustees not only had responsibility for the care and operation of the Armory, but they had an additional obligation under the City lease of the public land to insure that the Armory was "used exclusively for an armory and drill rooms by said regiment."

Early in the performance of their fiduciary duties, the Seventh Regiment Trustees were told by the Courts of New York that any attempt to enter into an agreement with anyone "granting exclusive use of a large and valuable room" [in that case the "Veteran's Room"—now scheduled for a commercially-operated reception facility] "for purposes entirely separate and distinct from an armory or drill rooms for

the regiment" would be "a breach of trust." That is what has now happened.

> The armory in question, as already stated, is a public building, devoted to a public use, and the board of field officers to whom the same was leased under the provisions of the act of 1874, before referred to, hold the same really as trustees for the public, for public purposes, and upon the express condition that the site is to be thereafter exclusively held and used for an armory and drill rooms by said regiment. Green's Brice, Ultra Vires, p. 120. As such trustees, the board of field officers were not authorized to divert the use of the building in any way from the public use to which it was devoted by the various acts of the legislature under which it was erected; * * *.
>
> *Veterans of Seventh Regiment v. Field Officers*, 60 Hun 578, 14 NYS 811, 816 (1891)

The Court ruled that any such agreement would be "absolutely void, as not within the power of the [trustee] defendants" and would constitute "a violation of their duty as trustees." *Id.* at 817.

Commercial Restaurant Takeover

The Conservancy lease provides for a high-priced restaurant, bar and catered reception spaces in the historic Regimental rooms on the First Floor of the historic Armory, plus a series of private corporate reception rooms in the landmarked Company rooms on the Second Floor. (Appendix, pages 37a to 43a)

The historic spaces that are being restored with public funds will be used to provide exclusive pri-

vate dining facilities for well-to-do customers, business executives, and ticket-holders for concerts and performances. The level of these services is clearly demonstrated by the three caterers and restaurateurs selected by the Conservancy to submit proposals for operating these spaces year-round. They include the entrepreneurs who operate the expensive "Four Seasons" Restaurant in the Seagram Building, and the former "Windows on the World" in the World Trade Center (with its famed wine cellar). (Appendix, pages 37a-39a)

In its 1992 resolution giving the Armory's interior rooms official landmark status, the NYC Landmarks Preservation Commission made particular mention of the beauty of the Veterans' Room and the Library on the First Floor of the Armory:

> ". . . the Veterans' Room and Library, designed and decorated by Associated Artists (Louis C. Tiffany & Co.), are considered among the most beautiful and significant surviving interiors of the American Aesthetic Movement . . ."

The Conservancy's plans for the First Floor calls for use of these "most beautiful and significant" rooms as a commercially-operated catered reception area with a combined capacity of 215 persons.

The Conservancy's use of all of the officially designated historic Regimental and Company interior spaces as attractions for an elite clientele of upper income individuals, priced to exclude the general public, violates the Constitution's "public use" clause and makes a mockery of the tributes to the sacrifice and heroism of the ten Congressional Medal of Honor awardees and other soldiers who served in the Seventh Regiment and its successors,

along with citizen-soldiers and other military service men and women currently serving in combat areas abroad—plus those who served this country in the past during the Civil War, World Wars I and II, Korea, Vietnam, the Persian Gulf and other wars. (Complaint pars. 61-67)

Denial of 14th Amendment Rights

Following the passage of the 2004 state legislation and execution of the Development Corporation lease in 2006, these veterans were denied all access to the Armory.

Footnote 17 to the *Kelo* majority opinion notes that:

> These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).
>
> *Kelo v. New London*, 545 U.S. 469, 487 (2005)

In *Village of Willowbrook*, it was the scheme itself that bestowed standing on the plaintiffs, by depriving them of Equal Protection.

The applicability of the Equal Protection Clause was explained in Justice Kennedy's Concurring Opinion in Kelo:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a

> particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-536 (1973).
>
> *Kelo v. New London*, 545 U.S. 469, 491 (2005)

Excluding veterans from spaces in the Armory in favor of wealthy patrons does not pass the test for equal protection of the law.

Veterans' Right of Association

Military veterans share a special bond growing out of their common experience in uniform which most ordinary civilians cannot begin to understand. This special spirit of camaraderie often takes the form of joining veterans' associations (like the American Legion or Disabled American Veterans) and in dinners, picnics, Memorial Day observances or other regular gatherings.

It is an important liberty interest embodied in the constitutional right to free association and assembly, recognized by this Court as deserving of protection in *Bates v. Little Rock*, 361 U.S. 516 (1960).

The state legislation here that closed the Armory to veterans is one of the injuries-in-fact that supports the veterans' standing to bring this case.

Subject to the 'Closest Scrutiny'

State action seizing control of space previously freely and wholly accessible to war veterans does not simply implicate Fifth and Fourteenth Amendment protections. The wresting of control of the

Armory space also effected the sheering off of regular personal contact, the 'esprit de corps' of shared experiences, and the associations and shared values of comrades-at-arms. This arbitrary deprivation of place and associations echoes the fundamental violations first raised by this Court in the Civil Rights Cases and later summarized in *Buckley v. Valeo*. "In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama, supra* at 460-461." *Buckley v. Valeo*, 424 U.S.1, 25 (1976)

Where associational freedoms are impinged, this Court has required heightened scrutiny:

> As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Bates v. Little Rock*, supra, at 524; *NAACP v. Alabama*, supra, at 463.
>
> *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)

If previously free unrestricted association has any constitutional protection—especially for America's war veterans—then the restriction of this most fundamental right is subject to the strictest scrutiny and the state statutes affecting such rights must be drawn with precision. Here, the change in control of an historic structure is not all that is involved. The sudden, arbitrary and severe change in use has 'unnecessarily burden[ed] or restrict[ed] constitutionally protected activity' without appropriate tailoring to serve legitimate objectives.

Armory Property Rights

The Court of Appeals, like the District Court, took a narrow and literal approach to defining whether military veterans have any ownership rights in the Armory which would give them standing to challenge the Armory taking under the Fifth Amendment. That approach was too simplified for such a complex institution with a long history.

The New York Court of Appeals squarely held that the Armory was owned by the Regiment itself.

> It was clearly the purpose of the Legislature to recognize that the building in question is owned by the regiment.
>
> *Tobin v. Laguardia*, 276 NY 34, 43 (1937)

The legislation put that ownership in the hands of Trustees. Who are the beneficiaries of that Trust?

(1) Are they only the current Regiment members in uniform and on active duty?

(2) Are they retired members (like Mr. Wells) and other Seventh Regiment veterans he represents?

(3) Are they the legal heirs of those who contributed money to build and furnish the Armory in the 19th century?

(4) Are they those who contribute "sweat equity" into the Armory (like Mr. Fitzgerald and Mr. Wells)?

We argue that each and all of these are joint owners of the Armory, and that each has Article III standing to challenge the Conservancy's taking of the Trustee-owned Armory as unconstitutional.

When a soldier leaves active duty, he does not erase all past associations, friendships, memories or

ties with the Regiment and fellow soldiers. It is a wholly artificial argument to assert that a veteran of the Seventh Regiment no longer has any liberty or property interest in the Regiment's headquarters and meeting spaces. That continuing interest is symbolized by the very name of "The Veterans' Room"—the principal gathering space dedicated to and used for gathering by individuals who have served in the Regiment. The formal contractual exclusion of Plaintiffs and their military colleagues under Chapter 482 from use of the Veterans Room deprives them of a liberty interest and property right, and sharply illustrates the unconstitutional effects of Chapter 482.

The Nature of "Property Right"

At the time of the 2004 state legislation, the Armory was privately owned by the Regiment's Field Officers as Trustees for the Regiment. The individual Petitioners assert they were beneficial users of the Armory as officers of the Regiment's support and affiliated organizations.

> *Beneficial use.* The right to use and enjoy property according to one's own liking or so as to derive a profit or benefit from it, including all that makes it desirable or habitable, as light, air, and access; as distinguished from a mere right of occupancy or possession. Such right to enjoyment of property where legal title is in one person while right to such use or interest is in another.
>
> *Black's Law Dictionary*,
> Fifth Ed., West, 1979

Locke Vision of Property and The Constitution

The Framers' concept of "property" as used in the Constitution drew upon principles of natural law espoused by John Locke, the English philosopher whose writings on natural rights influenced the Founders.

Locke's theory of property revolved around the concept that property is a natural right, and that property is derived from labor. A central concept was that government could not dispose of the estates of subjects arbitrarily.

Significantly here, Locke's Second Treatise of Government[3], the one on which the Framers based their concepts of natural rights and property rights, considered that civil society was created for the protection of property. His source was the etymology of the very word "property"—from Latin, "proprius,"—that which is one's own, and from French, "propre"—in which he included the concepts "life, liberty and estate."

From Locke we derive the concepts of "life, liberty and property" of the Fifth Amendment. But to Locke, life and liberty were co-equals with what is now considered "real property." Each man owned himself, at a minimum, and he owned his own labor and the fruits of it. The relationship between the state and its citizens consisted in a contract to provide order and protection by the state. Everything a person had, everything that pertained to him, could

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3 "Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government".

be attributed to him was his property, including his good name.

The only justifiable government deprivation of property was by 'the law of the land,' or what has come to be known as 'due process.'

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.
>
> *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Justice Frankfurter concurring)

Plaintiffs' interest in the Armory are as bound up with the Lockean concept of "property" and "liberty" as it is with the definition of what is "due process" under the circumstances of this case.

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.
>
> *Ex parte Virginia*, 100 U.S. 339, at 346-347 (1879) quoted in Justice Harlan's dissent in the *Civil Rights Cases*, 109 U.S. 3, 57-59 (1883)

These Petitioners satisfy both the common sense and philosophical principles of Armory ownership rights.

Aesthetic and Recreational Rights

Plaintiffs have suffered an injury-in-fact by being denied free and open use and enjoyment of the Armory's aesthetic and recreational resources as a National Historic Landmark, not unlike the aesthetic and recreational rights of bird-watchers and animal welfare activists in environmental cases. See *Friends of the Earth, Inc., et al v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181-183 (1999).

Article III Amendment Standing

Petitioners have a triple ground for Article III standing:

(1) They each had a property interest in the armory at the time of the challenged state takeover legislation; and

(2) They each had an aesthetic and recreational right to enjoy the unique historic rooms and artifacts in this National Historic Landmark; and

(3) They also possessed First Amendment rights in the Armory that give them standing to sue—rights of association, assembly and free speech—all of which have been damaged and injured by the state legislation effectively denying them access to the Armory.

These three principle grounds support Petitioners' standing as Plaintiffs in the declaratory action and related claims below.

Chief Justice John Marshall said,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. * * * The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.
>
> *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

The remedy here lies in the Fifth Amendment takings, due process and public use clauses, and recognition of these Petitioners' injuries under the First, Fifth and Fourteenth Amendments to the United States Constitution.

The combination of the Armory's original 19th century Lease and Regiment Trustee ownership, together with the individual petitioners' long service to the Seventh Regiment's support groups gives them constitutionally-protected liberty and property interests in the Armory sufficient to establish their standing in this case.

POINT II

MILITARY VETERANS HAVE A FREE SPEECH RIGHT TO OFFER MUSEUM PROGRAMS AND EXHIBITS IN THE ARMORY'S PUBLIC SPACES TO EDUCATE VISITORS ABOUT THE ROLE OF CITIZEN-SOLDIERS IN AMERICA'S WARS, AND THAT RIGHT WAS DENIED BY STATE ACTION VIOLATING THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS

On October 23, 1964, the Board of Regents of the State of New York granted an absolute charter to the 107th Infantry Regiment (Seventh, New York) Historical Society to establish and maintain a military history museum.

> Board of Regents Minutes October 23, 1964, Absolute Charter, *107th Infantry Regiment (Seventh New York) Historical Society*, An absolute charter is granted incorporating George K. Brazill, L. Emory Boyden, Walter A. Capitain, Joseph A. Cox, P. Randolph Harris, George F. Johnston, Kenneth C. Miller and Leslie M. Stewart as trustees.
>
> The purposes for which such corporation is to be formed are:
>
> a. To collect, receive, and preserve books, papers, documents, diaries, letters, records, citations, battle streamers, flags, honors, metals, decorations, and other memorabilia pertaining to the Seventh Regiment, New York National Guard;
>
> b. To maintain a museum and library for the care and custody thereof;

c. To assist in maintaining the historical continuity of this distinguished regiment, regardless of changes in tactical organization in peace and war;

d. To provide an opportunity for the individual soldier to become familiar with the history and traditions of the Seventh Regiment;

e. To maintain records of members of the said regiment; and

f. To direct or conduct research into the history of the Seventh Regiment, and to publish the results of such research.

Recognition that there is a strong need for a humanistic military history museum is supported by scholars, historians and particularly those who have served as citizen-soldiers in recent U.S. military engagements and have received little or no public understanding of the sacrifices such service involves[4]. The Board of Regents charter provides the seed for such a museum.

The Funding Issue

The obvious source of funding for planning, installing and operating a first-class museum on America's citizen-soldiers in the Seventh Regiment Armory is out of the rental income the Armory receives from the annual antique art and antiquarian book shows held in the Armory's Drill Hall. In past years, the State withheld these funds. Now the State has agreed to turn them over, not to the Regiment, but directly to the defendant Conservancy as the

[4] See, e.g., statement of Thomas Fleming, President of the American History Association, at LafayetteFreedomCenter.org.

Empire State Development Corporation's lessee. (Complaint pars 41-50)

Taking advantage of the potential for generating additional income from the interior landmarked Regimental and Company rooms in the Administration Building—formerly used by the Seventh Regiment and its veterans—the Development Corporation's lease requires that these spaces be converted and used as commercial rental space for restaurants and cocktail reception areas—destroying all hopes of preserving those spaces for the Armory's public purposes to present military history museum programs or museum exhibits for visitors.

These rooms themselves are prime artifacts and the most obvious site for interpreting the more than hundred years of military use by the Regiment and its officers.

Set out in the Appendix are exhibits from the Complaint showing the floor plans for the first and second floors of the Administration Building from the Conservancy's lease, along with the lease schedules providing for future use of these historic landmarked rooms for commercial restaurant and reception purposes. (See Appendix, pages 40a-43a)

Equal Protection Standing

The District Court also rejected any claim that Plaintiffs were denied equal protection as a basis for standing:

> * * * Plaintiffs have failed to show that they were "able and ready" to apply to the ESDC's request for proposals to restore and renovate the Armory. Although Plaintiffs assert that they were prevented from doing so because the Con-

> servancy, not they, received a monetary grant for proposed restoration and renovation, this does not state an equal protection violation.
>
> (Appendix page 20a)

In *Clements*, this Court ruled that the Plaintiffs, officeholders who resisted violating the very statute whose constitutionality they were challenging lest they lose the offices they held, were not asserting a hypothetical controversy simply because they failed to experience the ultimate sanction.

> Baca's dispute with appellants over the constitutionality of § 19, therefore, cannot be said to be abstract or hypothetical, since he has sufficiently alleged that § 19 has prevented him from becoming a candidate for the legislature.
>
> *Clements v. Fashing*,
> 457 U.S. 957, 962-963 (1982)

Just as the appellees in *Clements* would not announce their candidacy for higher office (and violate the challenged statute) yet retained a justiciable controversy, here, the veteran-Petitioners did not waive their opportunities for meeting and assembling and for mounting their long-planned and long-chartered museum by failing to apply to the ESDC as lessees—particularly since they were already in occupancy as officers of Seventh Regiment affiliated and support organizations.

The facts alleged in the Complaint here made clear the linking scheme entirely orchestrated by a private law firm for its private client with interests in direct conflict with the rights of the veterans who regularly used and met in the Armory. To require these veteran Petitioners to challenge that scheme

by participating in it comports neither with due process nor equal protection.

There is no bright line classification rule when it comes to repugnance to the Equal Protection clause. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955)

The veterans were under no obligation to respond to the RFP in a scheme entirely against their long-standing interests to use the Armory for meetings and events and to establish a museum within the walls of a structure they had long called 'home' and long used in service to the military purposes for which it was first constructed. In addition to that conflict with the challenged ESDC scheme—all masterminded by the very private party that would receive preferential, favored treatment "invidious" to the veterans, and thus supporting the veterans' equal protection claim—that conflict also supports their First Amendment claim.

A first-class human interest military history museum program and exhibits is an obvious objective for exercise of plaintiffs' First Amendment rights. The huge success of the Intrepid aircraft carrier navy history museum berthed on the West Side of Manhattan shows the level of public interest available for an equivalent army history museum just a few blocks away on Manhattan's East Side.

The obvious response to the District Court's rejection of the Armory site for the museum is—where else would you put such a museum? The Armory is where recruits were enlisted and drilled in preparation for wartime service, and where the regimen-

tal officers and veterans returning home met and told "war stories" during peacetime. The historic and aesthetic importance of the spaces has been certified by the New York City Landmarks Preservation Commission and U.S. Department of the Interior. The rooms should certainly not be demeaned as high-end Park Avenue restaurants for the well-to-do, while American military veterans are *de facto* denied access.

Deprivation of Plaintiffs' liberty interests by the New York legislature destroyed all possibility of establishing public museum programs and exhibits telling the story of America's citizen soldiers in the landmark interior rooms on the first and second floors of the Armory, which was plain injury-in-fact giving Plaintiffs standing to file this action.

POINT III

VETERANS ASSOCIATION PETITIONERS HAVE A STATUTORY RIGHT OF FREE ACCESS TO THE ARMORY'S "VETERANS ROOM" AND OTHER REGIMENTAL ROOMS FOR MEETINGS AND SOCIAL EVENTS, AND THAT RIGHT WAS DEPRIVED THROUGH STATE ACTION IN VIOLATION OF NEW YORK STATE MILITARY LAW SECTION 183 AND THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS

In New York State, veterans have a statutory free right to use any armory in the state. That right was arbitrarily cancelled for the Seventh Regiment Armory by the challenged state statute.

The District Court (and the Circuit Court during argument) dismissed the DAV's objection to the loss of that right by asserting

> The Armory is owned by the State, and, assuming that Plaintiffs have a limited statutory right of access to the Armory upon application, Plaintiffs have not alleged that they have applied for and been denied access to the Armory.
>
> (Appendix, page 22a)

That response misses the point. It is not simply the change in control that is involved here, but the change in use. As noted above, all of the first and second floor meeting rooms have now been assigned under the lease itself for use as commercial restaurants, cocktail lounges and reception spaces. (Appendix, pages 37a to 43a) The free meeting spaces for veterans' organizations have simply been taken away. High-priced restaurants are no substitute for free historic regimental and company rooms lined with battle flags and memorabilia.

Plaintiff-Appellant Sidney Siller is Department Adjutant for the Disabled American Veterans, Department of New York, Inc.; and a disabled veteran of World War II and the U.S. military force in Korea in 1945 and 1946. The Disabled American Veterans Department of New York, Inc. is one of the veterans organizations expressly granted free use of armories in New York State for regular and special meetings and organization events under Section 183 of the Military Law of New York State. The DAV brings this action on its own behalf and, along with Sidney Siller, as class representative for members of other veterans' organizations granted similar rights under such law.

All of these veterans' organizations had the statutory right to use the Seventh Regiment Armory for free meeting space prior to the challenged 2004 legislation which eliminated that right by closing off all available meeting spaces in the Armory Administration Building. The limitation of military space to two small offices on the third floor of the Armory is the equivalent of the "Laidlaw discharges" that prevented the recreational activities enjoyed by FOE member Kenneth Lee Curtis, bestowing on him Article III standing due to injury-in-fact. (*Friends of the Earth, Inc., et al v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181-182 (1999)) The two third floor offices assigned for military use under the ESDC lease amount to 1.4% of the total square footage in the Administration Building, while the Conservancy occupies over 98.6% of the space. (Complaint, par. 90)

Favored Parties and Preferential Treatment

The Supreme Court has held that individual rights guaranteed by the Fourteenth Amendment prohibit state bestowal of benefits on favored parties through preferential treatment, even where the act may be assumed to be done in good faith. The Veterans organizations in New York State have all been effectively excluded from the Armory by assigning the Armory meeting spaces to commercial restaurant and catering use. This constitutes injury-in-fact giving them standing to bring this action. See, *Regents of the University of California v. Bakke*, 438 U.S. 265, 319-320 (1978).

The State has effectively shut out one identifiable population group in favor of another, effecting state

affirmative preferential treatment prohibited by the Fourteenth Amendment.

The action is prohibited under *Kelo* for favoritism; the action is prohibited under *Bakke* for exclusion. The Petitioner veterans organizations have been classified as undesirable entrants onto the property by the very state action encompassed by the legislative scheme favoring others. The classifications are insidious because they are not express. But they are as real as if they were express in the legislation and in the lease it effected.

Most offensive to veterans (and other citizens) is denial of access to the Armory space honoring recipients of the Congressional Medal of Honor—the nation's highest military award for valor—by its conversion into an entrance hall for the Conservancy's commercial banquet and reception area.

In the cases that have come to be known as the civil rights cases, the First Amendment protection of association was claimed as a shield against disclosure of membership lists in *Bates v. Little Rock*, 361 U.S. 516, 524-527 (1960). The Supreme Court recognized that association was a fundamental liberty right due special protections in the balance of state's interest.

While the disclosure of NAACP membership lists in Alabama at the height of the civil rights struggle cannot be compared to abridgement of associational freedom of veterans of the armed forces, the fundamental liberty interest is the same, those rights of assembly and association—not for political purpose, but for purposes much more basic and fundamental to the protection of liberty: former comrades-at-

arms finding companionship in a place dedicated to the purpose.

The principle in common with the disclosure of NAACP membership lists in the *Bates* case that exists here is the limitation on freedom of association in violation of equal protection and in violation of the rule enunciated by this Court. (*Id.* at 525)

CONCLUSION

All of the first and second floor meeting rooms of this historic Armory—previously wholly dedicated to military use—have now been assigned under the state's lease for exclusive use as commercial restaurants, cocktail lounges and reception spaces, preventing use by the military veterans—Petitioners here—who formerly used or had free access to them.

It is difficult to describe what such *de facto* eviction means to former soldiers who have survived battle and returned home to share bonds in a special setting bespeaking a spirit shared with those who have, for generations in the same great tradition, gone before them. This is the formless thing whose deprivation was described by this Court in *Harman v. Forssenius* and cited in *Dunn*. " 'Constitutional rights would be of little value if they could be . . . indirectly denied'. . . ." *Dunn v. Blumstein*, 405 U.S. 330, 341-342 (1972) (Footnotes omitted.)

See also *Gomillion v. Lightfoot*, "'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583,

594." [*Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960)]

The question for this Court is not merely one of who has standing to challenge state action that deprives property, but whether these veterans have standing to challenge state deprivation of cognizable rights under the First, Fifth and Fourteenth Amendments that have been injured through state action. Is their past and ongoing association in a specific historic and sacred setting a liberty interest that may not be summarily and arbitrarily deprived through state action?

The fundamental question in this case is whether the State Legislature can take away Petitioners' Constitutional rights in the course of transferring a privately-owned historic building and land lease to a favored private group.

We ask that the Court grant this Petition for Certiorari, and recognize the standing of Petitioners to litigate the full case on the merits.

Respectfully submitted,

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